

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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GQ SAND LLC,

Plaintiff-Counter-defendant,

v.

OPINION AND ORDER

15-cv-152-wmc

CONLEY BULK SERVICES, LLC, RANGE  
MANAGEMENT SYSTEMS, LLC and  
NEJGID, LLC,

Defendants-Counter-claimants.

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In this civil action, plaintiff GQ Sand LLC alleges that: (1) defendants Conley Bulk Services, LLC (“CBS”) and Range Management Systems, LLC, breached the terms of two contracts; and (2) defendant NEJGID, LLC, intentionally interfered with those contracts.<sup>1</sup> Before the court are two motions. Defendant NEJGID now seeks leave to file a counterclaim against GQ Sand for breach of contract. (Dkt. #34.) For the reasons that follow, the court will grant that request. In addition, defendant CBS seeks an order requiring GQ Sand to deposit with the court pending resolution of this lawsuit the sum of \$157,000 allegedly advanced by CBS pending resolution of this lawsuit. (Dkt. #42.) Finding no basis to order such a request, the court will deny that motion.<sup>2</sup>

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<sup>1</sup> As may be obvious to all, I will nevertheless note for the record my having neither heard of CBS before the filing of this lawsuit, nor to the best of my knowledge having any, even distant, relationship to the “Conley” in its name.

<sup>2</sup> Also before the court is Conley Bulk Services LLC’s unopposed motion for leave to file amended counterclaim (dkt. #45), which the court will grant. GQ Sand LLC may have until March 25, 2016, to answer, move, or otherwise respond.

## OPINION

### I. NEJGID's Motion for Leave to File Counterclaim

On March 9, 2015, plaintiff GQ Sand filed its complaint and a little over a month later, on April 14, filed an amended complaint containing sufficient allegations for this court to determine that there is diversity between the parties.<sup>3</sup> Two days later, on April 16, defendant NEJGID filed its answer to the original complaint, along with various affirmative defenses. Approximately two weeks later, on April 28, NEJGID filed an answer to the amended complaint.

The preliminary pretrial conference order later set June 1, 2015, as the deadline for amending pleadings without leave of court. Two months after that deadline, on August 10, NEJGID filed the present motion for leave to file a counterclaim for breach of contract against plaintiff pursuant to Federal Rule of Civil Procedure 15(a)(2).

Plaintiff opposes the motion on two grounds. *First*, plaintiff contends that leave would be futile because the proposed counterclaim would not be able to survive a motion to dismiss. Specifically, plaintiff contends that “in its proposed counterclaim, NEJGID fails to plead the formation of any contract between it and GQ Sand regarding the purchase of sand,” instead it simply pleads that the two parties “discussed” an agreement. (Pl.’s Opp’n (dkt. #35) 2 (quoting Def.’s Proposed Countercl. (dkt. #34-1) p.2 ¶ 2.)

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<sup>3</sup> The court has subject matter jurisdiction under 28 U.S.C. § 1332(a), because there is complete diversity between the parties and the amount in controversy exceeds \$75,000. (Am. Compl. (dkt. #11) ¶¶ 1-4 (plaintiff is a citizen of Wisconsin; defendant Conley Bulk Services, LLC is a citizen of Arkansas; defendant Range Management Systems, LLC is a citizen of Texas; and defendant NEJGID, LLC is a citizen of Texas).)

The court does not, however, read defendant's allegations as narrowly as plaintiff. To the contrary, NEJGID affirmatively alleges that the parties *agreed* NEJGID would purchase 10,000 tons of frac sand for one of its customers and that the parties would then "split the profit on the transaction equally." (Def.'s Proposed Countercl. (dkt. #34-1) p.2 ¶¶3-4.) For purposes of notice pleading, these allegations are sufficient to meet the requirements of Federal Rule of Civil Procedure 8, particularly since they include the seeds of a quasi-contract claim, if not contract.

Plaintiff would similarly take issue with the sufficiency of the allegations regarding the nature of the *breach* itself (assuming a contract exists). Here, too, the proposed pleading adequately alleges that: (1) GQ Sand failed to produce all of the frac sand required by the alleged contract; and (2) NEJGID suffered monetary damages as a result. At the pleading stage, this is once again all that is required by Rule 8. Whether the alleged contract was *in fact* formed, whether it was breached, and the amount of damages, are all issues for another day.

*Second*, GQ Sand opposes NEJGID's motion on the basis that it is being proposed in bad faith. In support of this argument, GQ Sand points to an affidavit by one of its LLC members, Joe Gargano, who in turn attaches a lengthy email exchange purportedly with defendant NEJGID's sole member, Carl Hudspeth. A brief review of these materials simply underscores the material factual disputes between the parties that appear to underlie this lawsuit. Regardless, these disputes disclose no *blatant* evidence of bad faith

on the part of NEGJID to justify denying leave to file and pursue a counterclaim at this early stage of the parties' dispute.<sup>4</sup>

For the reasons provided above, the proposed counterclaim satisfies Rule 8, which is all that is required at this stage. Accordingly, NEGJID's motion for leave to file a counterclaim for breach of contract against GQ Sand is granted. The proposed counterclaim at dkt. #34-1 will be deemed filed and served. GQ Sand may have until March 25, 2016, to answer, move, or otherwise respond.

## **II. CBS's Motion for Order Requiring GQ Sand to Pay Deposit Into Court**

In support of its motion to require plaintiff GQ Sand to deposit \$157,000 -- an amount GQ Sand allegedly received as part of the parties' frac sand contract -- with the court, CBS cites Federal Rules of Civil Procedure 1 and 67(a). Unfortunately for CBS, neither rule lends support for its unusual request. Certainly, should CBS prevail on a breach of contract counterclaim against GQ Sand, then CBS may well be entitled to reimbursement of the alleged \$157,000 deposit, assuming that this is a proper damages remedy. But this is a very different question that whether the court should, or even may, exercise its narrow authority to order attachment or deposit of sums *pre-judgment*. *See* Wis. Stat. § 811.03 (setting forth narrow bases for prejudgment attachment).

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<sup>4</sup> Of course, to the extent that GQ Sand believes that the counterclaim does not meet the requirements of Rule 11, or can be demonstrated to have been filed in bad faith at summary judgment, it is free to bring such a motion, but the court is obviously ill-equipped and, in any event, will not parse through the parties' factual dispute at the pleadings stage to determine whether NEGJID's allegations are supported by the facts, much less do so at the truly preliminary stage of seeking leave to amend.

The case cited by CBS is readily distinguishable. In *Nankin v. Beverly Enterprises-Wisconsin, Inc.*, 744 F. Supp. 540 (E.D. Wis. 1991), the court exercised its equitable powers to require the landlord to pay a security deposit into the court in conjunction with requiring the plaintiff-tenant in that case to continue to pay rent. The court reasoned that it would be unfair for the landlord to continue to receive rent due under the lease, while permitting “to keep money that would have had to be returned under the lease.” *Id.* at 542.

That dynamic is obviously not at issue here. Under its theory, GQ Sand has a right to keep the deposit because CBS prematurely and unilaterally voided the contract. Alternatively, CBS may have a right to the deposit if GQ Sand breached the parties’ contract by failing to perform its terms. Since it remains to be decided that a sum certain is even due or owing, much less that the other requirements of § 811.03 are met, the court has no power to intervene at this stage of the litigation.<sup>5</sup>

Rule 67(a) is of no help to CBS either. The plain language of that provision sets forth a mechanism for depositing disputed funds into a court account, but does not contemplate that a party be *compelled* to do so. This rule is typically used by a nominal party -- like interpleader defendant Associated Trust Company, N.A., in this case -- as a means to deposit disputed funds and extricate itself from the dispute.

Finding no basis for ordering this unusual relief here, the court will deny CBS’s motion.

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<sup>5</sup> In the unlikely event that CBS should be able to establish a bases for extraordinary equitable relief under § 811.03 in advance of trial, it may, of course, renew this motion.

## ORDER

IT IS ORDERED that:

- 1) Defendant NEJGID, LLC's motion to file counterclaim (dkt. #34) is GRANTED and the attached counterclaim (dkt. #34-1) shall be deemed filed and served. Plaintiff GQ Sand, LLC has until March 25, 2016, to answer, move to dismiss, or otherwise respond to the counterclaim.
- 2) Defendant Conley Bulk Services, LLC's motion for order requiring payment of deposit into court (dkt. #42) is DENIED.
- 3) Defendant Conley Bulk Services, LLC's motion to file an amended counterclaim (dkt. #45) is GRANTED and the attached counterclaim (dkt. #45-1) shall be deemed filed and served. Plaintiff GQ Sand, LLC has until March 25, 2016, to answer, move to dismiss, or otherwise respond to the counterclaim.

Entered this 11th day of March, 2016.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge